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No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LACLEDE GAS COMPANY,
Petitioner,

v.

OFFICE OF THE PUBLIC COUNSEL OF THE
STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED

Whether the right to a meaningful hearing guaranteed by the due process clause of the Fourteenth Amendment requires a state administrative agency to hold a protracted, full-dress hearing involving multiple parties where only one party objects to a proposed settlement; or whether a state administrative agency may, consistent with the due process clause of the Fourteenth Amendment, adopt an expedited hearing procedure, comparable to the procedures currently in use by federal administrative agencies, which allows a non-settling party to go forward with its case while at the same time reserving to the state agency the right to approve the settlement based on all the evidence before it.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Court below were James M. Fischer, Public Counsel for the State of Missouri, the Public Service Commission of Missouri, and Laclede Gas Company.

TABLE OF CONTENTS AND AUTHORITIES

	Page
Question Presented	i
Parties to the Proceedings	i
Table of Contents and Authorities	iii,iv,v
Opinion Below	1
Jurisdiction	2
Constitutional Provisions, Statutes, and Rules Involved	2
Statement of the Case	3-6
Reasons for Granting the Writ	
1. The Decision Below is Erroneous and Unprecedented, and the Issue Presented Raises a Live, Important and Substantial Federal Question Concerning the Right of A Single Party to a Multiple Party Proceeding to Invoke the Due Process Clause of the Fourteenth Amendment in Such A Manner as to Unduly Delay and Impair the Effectiveness of a Quasi-Judicial Proceeding Before a State Administrative Agency, Notwithstanding such Party's Full Opportunity to Present its Case.	6
2. The Decision Below Conflicts with Recent Decisions of this Court and of other Federal and Local Courts, as to the Proper Interpretation of the Impact of the Hearing Requirement of the Due Process Clause on Non-Unanimous Settlements.	7-10
Conclusion	10

CITATIONS

Cases:

Federal National Mortgage Association v. Howlett, 521 S.W. 2d 428, 439 (Mo. banc 1975) 6

In re Hugoton-Anadarko Area Rate Case; the People of the State of California v. Federal Power Commission, 466 F.2d 974 (9th Cir. 1972) 8,9

Johnson v. Risk, 137 U.S. 300, 307 (1890) 5

Jones v. State Department of Public Health and Welfare, 354 S.W.2d 37, 41 (Mo.App. 1962)..... 5

Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872) . 5

Lawrence v. State Tax Commission, 286 U.S. 276, 282 - 283 (1932)..... 5

Maguire v. Tyler, 75 U.S. (8 Wall.) 650, 665 (1869)..... 5

Market St. Ry. Co. v. Railroad Commission, 324 U.S. 548, 562 (1945)..... 6

Metro. Wash. Bd. v. Public Service Commission, 432 A.2d 343, 361 - 363 (D.C.App. 1981) 8,9

Minnesota v. National Tea Co., 309 U.S. 551, 554 - 557 (1940) 5,6

Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5 (1950)..... 5

Mobil Oil Corp. v. Federal Power Commission, 417 U.S. 283, 312 - 314 (1974) 7,9

Pennsylvania Gas and Water Co. v. Federal Power Commission, 463 F.2d 1242 (D.C.Cir. 1972) 7,8

Placid Oil Company v. Federal Power Commission, 483 F.2d 880 (5th Cir. 1973) 8,9

Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 334, 337 - 338 (1938) 6

Star Square Auto Supply Co. v. Gerk, 30 S.W.2d 447, 456 - 458 (Mo. 1930) 6

State Tax Comm'n v. Van Cott, 306 U.S. 511, 514 (1939) . 6

State ex rel. Jones v. Atterbury, 300 S.W.2d 806, 816 - 817 (Mo. banc 1957) 6

State v. Owens, 259 S.W. 100, 101 (Mo. banc 1924) 6

Tonkin v. Jackson County Merit System Commission, 599 S.W.2d 25, 33 (Mo.App. 1980)..... 5

Williams v. Kaiser, 323 U.S. 471, 478 (1945) 5

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OFFICE OF THE PUBLIC COUNSEL OF THE
STATE OF MISSOURI,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Petitioner Laclede Gas Company ("Laclede") respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Missouri, dated February 23, 1983, denying Petitioner's request for a review of a decision of the Court of Appeals (Western District) of the State of Missouri.

OPINION BELOW

The order of the Supreme Court of the State of Missouri is not reported and is included in the Appendix hereto as Appendix A. The opinion of the Missouri Court of Appeals (Western District) is reported at 645 S.W.2d 39 and is included in the Appendix as Appendix B. The opinion of the Circuit Court of Cole County of the State of Missouri is not reported and is included in the Appendix as Appendix C. The order of the Commission is not reported, and is included in the Appendix as Appendix D.

JURISDICTION

The judgment of the Court of Appeals (Western District) of the State of Missouri was entered on November 9, 1982. A timely application for a Rehearing or to transfer to the Supreme Court of Missouri was denied by the Court of Appeals on January 4, 1983. On February 23, 1983, the Supreme Court of the State of Missouri entered an order denying Petitioner's timely application to review the decision of the Missouri Court of Appeals. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The order of the Commission approving the design of Petitioner's rates provides in part (Appendix D, pages A15-A16) as follows:

> "Although the proposed Stipulation, offered in this case, was not executed by all parties, and in fact actively opposed by the Public Counsel, the Commission is of the opinion that the proposed rate design in the Stipulation presents the fairest and most equitable distribution of the Company's [Laclede's] rates and should be the basis for disposition of the issues presented herein."...

"It is, therefore,

ORDERED: 1. That the rate design contained in the Stipulation and Agreement received in this matter as Exhibit 18 and attached hereto as Appendix A be, and the same is, hereby adopted in disposition of all matters in this case."

STATEMENT OF THE CASE

On July 1, 1977, the Commission instituted a proceeding (the "Commission Case") to investigate the rate design of the Petitioner. The active participants in the Commission Case included: (1) Laclede; (2) the Staff of the Commission; (3) the Respondent; (4) the City of St. Louis, Missouri; (5) six separate corporate customers of Laclede; and (6) a neighborhood community group comprised of numerous low income customers of Laclede. These active participants, over a period of three years, engaged in exhaustive discovery and numerous conferences. On October 1, 1980, all of the parties to the Commission Case, except the Respondent, executed and filed with the Commission a Stipulation and Agreement (contained in Appendix D hereto), which Stipulation and Agreement contained the joint recommendation of ten of the active parties regarding an allocation of the customer class revenues and a rate design for Laclede (the "Stipulation and Agreement"). The Stipulation and Agreement provided that: (1) the Respondent would have ample opportunity to present to the Commission its entire case and cross-examine all of the witnesses of the other parties; and (2) if the Commission determined that the rate design set forth in the Stipulation and Agreement was not adequate and reasonable, the hearing would continue and all of the parties to the Commission Case would then present whatever additional evidence they deemed advisable.

On October 9 - 10, 1980, the Respondent, at a hearing before the Commission, presented: (1) direct testimony and exhibits; (2) rebuttal testimony; (3) surrebuttal testimony; and (4) addi-

tional direct testimony and exhibits. The Respondent also cross-examined the witnesses of the other parties. On October 14, 1980, the Respondent presented its full oral argument.

The Respondent's case included: (1) a recommended methodology for designing Laclede's rates; and (2) rate schedules which purportedly supported the Respondent's recommended rate design methodology. During the proceedings, the Respondent changed its recommended rate schedules five times. The Respondent first filed with the Commission on May 28, 1980, its direct testimony wherein the Respondent's expert witness: (a) advocated that Laclede's rates be based on incremental costs; and (b) proposed specific new rate schedules. On September 10, 1980, the expert witness of the Respondent filed its surrebuttal testimony, which testimony included a change from the rate schedules it had advocated on May 28, 1980. On October 6, 1980, the Respondent (in an interview published in the *St. Louis Post-Dispatch* newspaper) advocated a third set of proposed rate schedules. The Respondent then filed with the Commission, on October 9, 1980, a fourth set of proposed rate schedules. Finally, on October 10, 1980, the Respondent filed yet a fifth set of rate schedule proposals.

On October 15, 1980, the Commission adopted the rate design identified in the Stipulation and Agreement as a part of the Commission's disposition of the merits of the Commission Case. In its petition before the Circuit Court of Cole County, as before the Commission, the Respondent, among other things, explicitly questioned the validity of the order in the Commission Case, and asserted there, as well as before the Missouri Courts, that the procedure utilized by the Commission in the Commission Case violated the due process clause of the Fourteenth Amendment to the United States Constitution. See, for example, Respondent's Motion For Rehearing, p. 4, filed with the Missouri Commission; Exhibit 2, p. 4 of Respondent's Petition for Writ of Review filed with the Missouri Circuit Court; Respondent's Brief, pp. 7 - 8, filed with the Missouri Circuit

Court; and Respondent's Brief, pp. 56 - 58, filed with the Missouri Court of Appeals. The Circuit Court of Cole County upheld the validity of the order and the proceeding in the Commission Case. On appeal, however, the Missouri Court of Appeals (the "Court Below") held that the proceedings in the Commission Case violated the Respondent's right to a meaningful hearing guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution.[1]

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[1] The Court of Appeals also held that the Commission's Order did not satisfy the state statutory findings of fact requirement. That non-federal decision, however, is not an *adequate* state ground to support the judgment below. That judgment reverses and remands this case for a full-dress plenary hearing. Insufficient or deficient findings of fact by the Commission can be cured by the Commission simply by reissuing its order with proper and adequate findings of fact included therein and without a further hearing. It is therefore abundantly clear that this non-federal portion of the decision below does not preclude this Court's review of the state court's federal constitutional decision. *Klinger* v. *Missouri,* 80 U.S. (13 Wall.) 257, 263 (1872); *Williams* v. *Kaiser,* 323 U.S. 471, 478 (1945); *Maguire* v. *Tyler,* 75 U.S. (8 Wall.) 650, 665 (1869); *Johnson* v. *Risk,* 137 U.S. 300, 307 (1890); and *Lawrence* v. *State Tax Commission,* 286 U.S. 276, 282 - 283 (1932).

Furthermore, while the Court below did not explicitly state that its decision requiring a plenary hearing was based on the due process clause of the Fourteenth Amendment to the United States Constitution, rather than the due process provision of the Missouri Constitution (Article I, Section 10), the opinion of the Court below relies upon *Tonkin* v. *Jackson County Merit System Commission,* 599 S.W.2d 25, 33 (Mo.App. 1980), and *Jones* v. *State Department of Public Health and Welfare,* 354 S.W.2d 37, 41 (Mo.App. 1962), both of which rely on federal decisions interpreting the federal due process clause. This court has frequently acknowledged its jurisdiction over cases originating in state courts where, as here, the state court judgment was based upon decisions applying the Fourteenth Amendment or this Court's enunciation of federal law. *Minnesota* v. *National Tea Co.,* 309 U.S. 551, 554 - 557 (1940); and *Missouri ex rel. Southern R. Co.* v. *Mayfield,* 340 U.S. 1, 5 (1950). Moreover, historically, Missouri Courts, in interpreting portions of the Missouri Constitution that are similar to those contained in the United States Constitution, have deferred to the construction and application given to the correspon-

REASONS FOR GRANTING THE WRIT

1. The decision below is erroneous and unprecedented, and the issue presented raises a live, important and substantial federal question concerning the right of a single party to a multiple party proceeding to invoke the due process clause of the Fourteenth Amendment in such a manner as to unduly delay and impair the effectiveness of a quasi-judicial proceeding before a state administrative agency, notwithstanding such party's full opportunity to present its case.

The Missouri Court of Appeals has incorrectly expanded the interpretation of the scope of the federal due process clause far beyond the teachings of this Court. *Market St. Ry. Co.* v. *Railroad Commission,* 324 U.S. 548, 562 (1945); and *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U.S. 334, 337 - 338 (1938). By permitting a single party in a multiple party administrative proceeding to demand that a state agency engage in unwarranted, and unnecessarily protracted hearings, the unprecedented ruling below seriously misconstrues the due process clause of the Fourteenth Amendment and effectively denies state agencies the procedural flexibility to handle expeditiously and efficiently their inordinately large case loads.

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ding federal constitutional provisions. *State* v. *Owens,* 259 S.W. 100, 101 (Mo.banc 1924); *Star Square Auto Supply Co.* v. *Gerk,* 30 S.W.2d 447, 456 - 458 (Mo. 1930); and *State ex rel. Jones* v. *Atterbury,* 300 S.W.2d 806, 816 - 817 (Mo.banc 1957). Thus, for example, the Missouri Supreme Court in *Federal National Mortgage Association* v. *Howlett,* 521 S.W.2d 428, 439 (Mo. banc 1975), in the context of its due process analysis, summarily concluded that the state due process clause did not apply to the facts of that case based upon its analysis of the due process clause of the Fourteenth Amendment to the Federal Constitution. Since interpretations of the Missouri due process clause and the federal due process clause are so interwoven, the judgment of the Court Below clearly does not rest upon an *independent* interpretation of state law. *State Tax Comm'n* v. *Van Cott,* 306 U.S. 511, 514 (1939). See also, *Minnesota* v. *National Tea Co., supra,* at 556 - 557 (an ambiguous and obscure state court adjudication should not interfere with this Court's process of properly determining the propriety of state action under the federal constitution).

Moreover, the erroneous ruling of the Court Below will have a chilling effect on the parties' ability to settle and compromise their cases before state administrative tribunals, and will create substantial confusion as to a state agency's right, under the federal due process clause, to approve non-unanimous settlements.

Before the Commission decided the issues in the Commission Case, the Respondent, as the sole dissenting party with respect to the proposed Stipulation and Agreement, was provided with full and unrestricted opportunity to: (1) engage in discovery; (2) present direct, redirect, rebuttal, and surrebuttal testimony; (3) cross-examine all opposing witnesses; (4) present evidence in opposition to the Stipulation and Agreement; and (5) argue the merits of Respondent's case. Respondent fully availed itself of these opportunities. Furthermore, the Commission was not precluded in any way from approving or rejecting the Respondent's case, or any part thereof.

If the decision of the Court Below were allowed to stand, any party to a multiple party proceeding before a state administrative commission would be in a position to preclude a prompt resolution on a compromise basis and to require a commission to continue proceedings for a protracted period. A commission's statutory responsibility to regulate utilities in an effective and expeditious manner will thus be effectively eroded and subjected to the whim of any single dissenting party. This should not be permitted to occur.

2. The decision below conflicts with recent decisions of this Court, and of other federal and local courts, as to the proper interpretation of the impact of the hearing requirement of the due process clause on non-unanimous settlements. The decision below is in direct conflict with this Court's decision in *Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283, 312 - 314 (1974), and with decisions in the District of Columbia and the Fifth and Ninth Circuits. *Pennsylvania Gas and Water Co. v. Federal Power Commission*, 463 F.2d 1242 (D.C. Cir. 1972);

Placid Oil Company v. *Federal Power Commission*, 483 F.2d 880 (5th Cir. 1973); and *In re Hugoton-Anadarko Area Rate Case; The People of the State of California* v. *Federal Power Commission*, 466 F.2d 974 (9th Cir. 1972). The decision below is also in conflict with the decision of the District of Columbia Court of Appeals in *Metro. Wash. Bd.* v. *Public Service Commission*, 432 A.2d 343, 361 - 363 (D.C.App. 1981).

In *Pennsylvania Gas and Water Co.*, (the "Penn Gas Case"), *supra*, petitioner asserted that it was denied procedural due process of law by virtue of the acceptance of a stipulation and agreement without a hearing. The stipulation and agreement involved in the Penn Gas Case had been agreed to by all of the parties to a proceeding before the Federal Power Commission (the "FPC"), except Pennsylvania Gas and Water Co. ("PG&W"). Judge Wilkey, writing for the District of Columbia Circuit, emphasized (at pages 1245 - 1246) that resolution of issues by settlement is in the public interest and stated that a single party to a multiple party proceeding should not be permitted to delay agency decisions for an indefinite period where the FPC determines it has before it sufficient evidence to resolve the issues presented. PG&W in the Penn Gas Case was permitted the opportunity to submit its full case to the FPC, and the FPC's decision was based on the evidence on the whole record. Judge Wilkey stated that the FPC's authority to bring proceedings before it to an end, over the objection of a party to the proceeding, is an inherent part of the FPC's authority as a regulatory agency. The same reasoning is applicable to the case at hand. The Missouri Commission's mandate as a regulatory agency similarly provides it with authority to conclude proceedings before it over the objection of a party; otherwise, a proceeding before the Missouri Commission could be unnecessarily and indefinitely continued by a lone dissenting party. The federal due process clause, as interpreted by this Court, is not intended to authorize a single party in a multiple party proceeding to hold the proceeding hostage until such time as the other parties and the agency accede to the dissenter's demands.

What the federal due process clause does provide to a dissenting party is the opportunity to present his case to the regulatory agency and to participate in the proceedings held by such regulatory agency. The record in the Commission Case conclusively establishes that Respondent had that opportunity here. The Respondent presented its case and fully participated in the proceedings. The due process clause does not require, as the Court Below in effect held, that a Commission proceeding must be unduly protracted whenever a single party with an extreme, unprovable and untenable position insists that it be. Such an interpretation of the federal due process clause would severely impair the ability and authority of the Commission to carry out effectively its statutory responsibilities, and is in no way mandated by due process requirements.

In the *Mobil Oil Corp., supra; Placid Oil Company, supra;* and *Hugoton-Anadarko, supra;* cases, this Court and the Fifth and Ninth Circuits recognized that the FPC could properly accept a non-unanimous settlement as a basis for its decision on the merits, provided such FPC determination was based on an independent finding supported by the substantial evidence on the whole record. The District of Columbia Court of Appeals in *Metro. Wash. Bd., supra,* also made a similar finding with respect to the local Public Service Commission. Here, there is no evidence in the record which would in any way indicate that the Commission either failed to consider the evidence submitted by the Respondent or refused to accept the factual allegations submitted by the Respondent as being true. On the contrary, the record in the Commission Case conclusively demonstrates that the Commission found the rate design [illegible] tion and Agreement preferable to the rate design advocated by the Respondent. To assume, as the Respondent did before the Court below, that the Commission simply ignored the Respondent's evidence is to engage in an assumption that has no basis in the record. If the decision of the Court Below were permitted to stand, then any party to a Commission proceeding failing to make a persuasive case would be in a position to force a state

regulatory agency and all other parties either to hold lengthy and non-productive hearings, or to consider adopting, in whole or in part, some of the dissenter's untenable assertions. Such a state of affairs would be inefficient, unfortunate, wasteful and counterproductive, and is in no way mandated by the Fourteenth Amendment.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Court Below.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 64754

IN THE SUPREME COURT OF MISSOURI

WD #33143

January Session 1983

State ex rel. James M. Fischer, Public Counsel,
Relator-Appellant,

vs.

Public Service Commission of Missouri,
Respondents,

and

Laclede Gas Company,
Intervenor-Respondent.

TRANSFER

Now at this day, on consideration of Intervenor-Respondent Laclede Gas Company's Application to transfer the above entitled cause from the Wester District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1983, and on the 23rd day of February 1983, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 23rd day of February 1983

/s/ Thomas F. Simon Clerk

/s/ Norma Jean Cresck D. C.

APPENDIX B

State ex rel. James M. Fischer,
Public Counsel for the State of
Missouri, Relator-Appellant,

v.

Public Service Commission of
Missouri, Respondents,

and

Laclede Gas Company,
Intervenor-Respondent.

No. 33143.

Missouri Court of Appeals,
Western District.

Nov. 9, 1982.

Motion for Rehearing and/or Transfer to
Supreme Court Overruled and Denied
Jan. 4, 1983.

Application to Transfer Denied
Feb. 23, 1983.

James M. Fischer, Michael C. Pendergast, Jefferson City, for relator-appellant.

William C. Harrelson, Jefferson City, for respondents.

Donald L. Godiner, Robert M. Lee, St. Louis, for intervenor-respondent.

Before NUGENT, P.J., and TURNAGE and LOWENSTEIN, JJ.

TURNAGE, Judge.

James M. Fischer, Public Counsel, appeals from a judgment of the Circuit Court which affirmed an order made by the Public Service Commission. Fischer contends the order is illegal because it was made without statutory authority. Reversed and remanded.

On August 15, 1977, the Commission sua sponte instituted an investigation of the rate design of Laclede Gas Company.[1] The Public Counsel, Laclede, and the Commission's counsel and staff all participated in this proceeding. In addition, the Commission granted petitions for intervention by the City of St. Louis, Union-Sarah Community Corporation, a community service corporation in St. Louis representing primarily low income consumers, and a group of industries including General Motors Corporation, Monsanto Company, ACF Industries, Inc., Anheuser-Busch, Inc., McDonnell Douglas Corporation, and Nooter Corporation. Laclede, Public Counsel, the Commission staff, and the industrial intervenors all filed prepared testimonies and exhibits with the Commission prior to scheduled hearings.

In September of 1980, hearings were held in St. Louis and Clayton to hear the testimony of the general public. Thereafter, all of the parties with the exception of the Public Counsel reached a compromise regarding the rate design issues. A stipulation and agreement was filed with the Commission setting forth such an agreement. The agreement proposed that the Commission approve revenue increases for the following customer classes: general service, seasonal service, large volume service, interruptible service, general L.P. gas service, unmetered gas light service, special contracts, and sales for resale. The increases ranged

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[1] A rate design is the allocation (of the burden of paying a utility's overall revenue requirement) among its various customer classes. Thus, a rate design does not alter the overall revenues received by the utility, but may dramatically change the rates paid by individual customers.

from $5,300 in sales for resale, to $417,400 in the general service class. The agreement further recommended a decrease of $1,144,600 in the general space heating class. Also included in the agreement was an allocation of the rate increase that the Commission had recently granted to Laclede. The agreement recommended that declining block rates be instituted for the general space heating and seasonal service classes.

The rate design hearing was set for October 9-10, 1980, and the Public Counsel appeared at that time prepared to present his case. However, at that time the Commission informed the Public Counsel that it had adopted a "limited hearing procedure," which was a part of the recommendation made by the parties to the stipulation and agreement. The procedure set forth in the agreement provided that any non-signing party would retain its right to present its case in full or in part, and to cross-examine any witnesses of any party to the agreement on any matter pertaining to the rate design case. The agreement further provided that after any non-signing party had been accorded its right to a hearing as provided by law, the Commission would enter an order either approving or disapproving the agreement. In the event that the Commission rejected the agreement, there would be a full and contested hearing, at which time each of the parties would address all the merits and issues of the case.

In accordance with the agreement, the Commission ruled prior to the hearing that the only issue it would consider was whether or not the stipulation and agreement would be accepted or rejected, and a full and contested hearing would be held only in the event that the Commission rejected the agreement. The Commission allowed the Public Counsel's witness to present the Public Counsel's rate design proposal, and allowed the Public Counsel to cross-examine the opposing witnesses regarding their prepared testimonies. A few days later the Commission heard oral arguments, and announced that it had voted to dispose of the matter under the terms proposed in the agreement.

On October 15, 1980, the Commission entered its order. After reciting a history of the rate design investigation the order continued as follows:

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

> The purpose of the instant case is the determination of the proper distribution of the Company's cost of service within the various classes of customers. The Commission, after considering the evidence offered on October 9 and 10, 1980, and the arguments of counsel on October 14, 1980, is of the opinion that the proposed Stipulation, although not joined in by all of the parties, represents the fairest and most equitable distribution of the rates authorized in Case No. GR-80-210. The proceedings conducted in this matter provided the Commission with the opportunity to accept or reject the Stipulation. If the resolution of the case which was advocated by the signatories of the Stipulation was rejected, the case was to proceed to full hearing with all parties free to advocate their respective positions taken prior to the prehearing negotiations. In determining that the Stipulation should be adopted, the Commission has taken into consideration that it resulted from extensive negotiations between groups with varying interests and economic positions. Not only have the negotiators included large-use industrial customers, but also representatives of the City of St. Louis with its cross section of citizenry as well as representatives of a neighborhood organization. In the Commission's opinion, the Stipulation attached hereto as Appendix A and offered by those diverse groups, represents a fair and reasonable distribution of the Company's rates and should be adopted in disposition of this matter.

[1] According to Secton 386.510, RSMo 1973, this court's review of an appeal from an order of the Public Service Commission is limited to a determination of the order's lawfulness and reasonableness. The question of an order's lawfulness turns on whether or not the Commission had statutory authority to act as it did. *State ex rel. Beaufort Transfer Co.* v. *Clark*, 504 S.W.2d 216, 217[2] (Mo.App.1973).

[2] Public Counsel first contends the Commission had no authority to abort the full hearing procedure and consider this matter under a limited hearing procedure. The Commission argues that under Section 386.410 RSMo 1977, it was authorized to consider this matter under the limited hearing procedure adopted. That section provides that all hearings before the Commission should be governed by rules to be adopted and prescribed by the Commission, and that no procedural formalities be observed.

Upon closer examination, it is clear that Section 386.410 did not authorize the limited hearing procedure utilized in this case. It does not, as the Commission claims, give it unlimited discretion to conduct its hearings in any possible manner. Rather, it gives the Commission flexibility in its proceedings, as long as its proceedings satisfy all other statutory requirements.

[3] One such section which sets forth minimal procedural requirements for Commission hearings is Section 386.420 RSMo 1978. This section guarantees that Public Counsel and all other parties to a Commission proceeding have the right to be heard and to introduce evidence. This section also states that whenever the Commission makes an investigation, "it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises." In *State ex rel. Rice* v. *Public Service Commission et al.*, 359 Mo. 109, 220 S.W.2d 61 (1949), the court stated that this statute[2] required the Commission to include findings of fact in all of its written

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[2] The 1939 version of the statute, which was relied on in *State ex rel. Rice*, was virtually identical to the current version.

reports.[3] *Id.* 220 S.W.2d at 65[8].

The order entered by the Commission in this case does not meet the statutory findings of facts requirement. The findings in this case, as quoted above, are completely conclusory, and provide no insights into if and how controlling issues were resolved.[4] There are many factual issues which the Commission would necessarily have considered before entering an order adopting a rate design for Laclede, but which are absent from the findings of fact. For example, the Commission increased the revenue from the rates in the general service class by $417,400, although Chairman Slaving stated in her concurring opinion to the order that there was no evidentiary support for this decision, except for the stipulation agreement itself. The adoption of declining block rates for general space heating and seasonal service classes also seems to have been made without evidentiary support, and was not mentioned in the findings of fact. The Commission's decision to decrease the class revenue requirement of the general space heating class by $1,144,600 was made without any findings of fact concerning the cost of services relative to this class, in comparison with the cost of services for other classes. In sum, the allocation of rates among the various classes of service rests on questions of fact. *Smith* v. *Public Service Commission,* 351 S.W.2d 768, 772[3] (Mo.1961). Since there were insufficient findings of fact in this case the necessary questions of fact were not resolved.

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[3] The Administrative Procedure Act also requires that orders in all contested cases contain findings of fact. Section 536.090, RSMo 1957. This statute was applied to the Public Service Commission in *State ex rel. St. Louis Public Service Co.* v. *Public Service Commission,* 365 Mo. 1032, 291 S.W.2d 95, 98[2] (1956).

[4] This issue has been addressed in cases not pertaining to the Public Service Commission in particular, but to administrative agencies in general. The standard required for findings of facts is set forth in *Glasnapp* v. *State Banking Board,* 545 S.W.2d 382 (Mo.App.1976). This court is persuaded that the findings of fact in this case are so obviously inadequate, that a discussion and application of the *Glasnapp* standard is unnecessary.

The above examples are but a few of the many findings of fact that the Commission was required to determine, but failed to address. Rather than performing its statutory duty to fix a rate design for Laclede based on findings of fact supported by competent and substantial evidence, the Commission appears to have simply adopted the stipulation agreement. This procedure is completely contrary to law, and cannot form the basis for a valid order by the Commission.

[4-6] Public Counsel has also contended that the limited hearing procedure used in this case violated due process of law. This court has authority to examine acts of the Public Service Commission for due process violations. *State ex rel. Chicago Rock Island & Pacific Railroad Company* v. *Public Service Commission,* 312 S.W.2d 791, 796[2] (Mo. banc 1958).

Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. *Tonkin* v. *Jackson County Merit System Commission,* 599 S.W.2d 25, 32-33[7] (Mo.App.1980) and *Jones v. State Department of Public Health and Welfare,* 354 S.W.2d 37, 39-40[2] (Mo.App. 1962). One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. *Merry Heart Nursing and Convalescent Home, Inc.* v. *Dougherty,* 131 N.J.Super. 412, 330 A.2d 370, 373-374[7] (1974).

The hearing procedure followed in this case failed to satisfy the due process requirement. Although Public Counsel was allowed to present his rate design proposal and to cross-examine the opposing witnesses, the Commission had previously decided that the only issue it would consider was whether or not to approve the stipulation and agreement. In light of this decision, the hearing afforded Public Counsel was not meaningful, in that the Commission was precluded from approving anything but the stipulated rate design in the course of the hearing in question. The question properly before the Commission was

what rate design to adopt, rather than whether or not to adopt one particular proposal. Thus, the hearing procedure adopted in this case was a violation of the due process which should be accorded to Public Counsel in his capacity as the representative of the public.

In her concurring opinion, Chairman Slavin stated that she voted for the order which adopted the stipulation agreement principally because that would allow the new rates previously adopted to go into effect almost immediately, whereas if a full hearing on the merits in the rate design case was held, a decision could not take effect in the heating season of 1980-1981. She concluded that the stipulated rate design offered the most immediate solution to those rate bearers who were most adversely affected by the rate case decided just before the rate design matter. However, the exigency of a situation does not constitute grounds for the Commission to act without statutory authority.

In conclusion, the limited hearing procedure used in this case was unauthorized. By adopting the stipulation agreement rather than conducting a full and contested hearing on the rate design issue, the Commission was able to avoid making proper findings of fact. In addition, the hearing procedure in this case violated due process of law by denying Public Counsel a fair and meaningful opportunity to be heard. Thus, the order in this case is unlawful in that the Commission had no statutory authority to act as it did. The judgment of the circuit court is reversed and this cause is remanded to that court with directions to remand this case to the Public Service Commission for further proceedings.[5]

All concur.

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[5] The Public Counsel objected that the order in this case failed to certify its compliance with Section 536.080 RSMo 1957 and Section 386.130 RSMo 1939, as discussed in *State ex rel. Jackson County* v. *Public Service Commission,* 532 S.W.2d 20, 30[6] (Mo. banc 1975), *cert. denied* 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). The Commission is well aware of the certification requirement, and future orders will undoubtedly contain such certification.

APPENDIX C

IN THE CIRCUIT COURT OF COLE COUNTY,
MISSOURI
DIVISON I

No. CV181-19cc

State ex rel. William M. Barvick,
Public Counsel for State of Missouri,
Relator,

vs.

Public Service Commission of Missouri,
Respondent,

Laclede Gas Company, a corporation,
Intervenor-Respondent.

ORDER AND JUDGMENT

NOW ON THIS 13th day of August, 1981, this cause having been taken up and considered, the Court finds that the Report and Order of the Respondent, Public Service Commission, issued on October 15, 1980, in "In the matter of the rate design of Laclede Gas Company, Case No. GO-78-38" is lawful and reasonable in all respects, and is supported by competent and substantial evidence upon the record as a whole; thus, the Court is required by law to affirm the said Report and Order.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the said Report and Order of the Respondent, Public Service Commission, issued on October 15, 1980, in "In the matter of the rate design of Laclede Gas Company, Case No. GO-78-38" be, and it is hereby, affirmed.

James H. McHenry
Circuit Judge

APPENDIX D

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

CASE NO. GO-78-38

In the matter of the Rate Design
of Laclede Gas Company.

APPEARANCES:

Robert M. Lee, Attorney at Law, *Donald L. Godiner,* and Lawrence J. Bannes, Attorney at Law, 720 Olive Street, Room 1528, St. Louis, Missouri 63101, for Laclede Gas Company

Freeman Robertson Bosley, Attorney at Law, Legal Services of Eastern Missouri, Inc., 607 N. Grand, St. Louis, Missouri 63103, for Union-Sarah Community Corporation.

Robert C. Johnson, Attorney at Law, 314 N. Broadway, St. Louis, Missouri 63102, for Industrial Intervenors, Monsanto, et al.

Robert C. McNicholas, Associate City Counselor, 314 City Hall, St. Louis, Missouri 63103, for the City of St. Louis and Thomas A. Connelly, City Counselor.

Herman Barken, Associate County Counselor, 41 South Central, Clayton, Missouri 63105, for Thomas W. Wehrle, County Counselor and St. Louis County, Missouri.

William M. Barvick, Public Counsel, and *James M. Fischer,* Assistant Public Counsel, P. O. Box 1216, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

Treva J. Hearne, Assistant General Counsel, and William C. Harrelson, Assistant General Counsel, P. O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REPORT AND ORDER

By its Report and Order in Case No. GR-77-33, issued July 1, 1977, the Commission expressed an intent to institute a separate case to investigate the propriety of the rate design of Laclede Gas Company (Laclede). On August 15, 1977, the Commission, by Order, instituted this docket for that purpose and directed all parties, so desiring, to file notice of intent to intervene and participate in a prestudy conference.

As a result of the prestudy conference, a schedule for prefiling evidence was established. In response to numerous requests by various parties, the time for filing evidence and the proposed hearing date was continued from time to time.

On April 29, 1980, the Public Counsel filed his Motion to Consolidate and Expand Hearings. In response to the Motion, the Commission, by Order dated May 19, 1980, consolidated this matter with Laclede's rate case in Case No. GR-80-210. Hearings were held for the public in St. Louis, Missouri, in both cases on September 9, 1980, and a prehearing conference was scheduled to commence in Jefferson City, Missouri, on September 15, 1980, with the hearing to commence on September 22, 1980, and continue for four weeks if necessary.

As a result of the prehearing conference, all parties entered into a Stipulation which presented to the Commission, and accepted, a disposition of Case No. GR-80-210. As a result of a further prehearing conference, five of the six active parties in the instant case executed a proposed Stipulation and Agreement. The Stipulation, filed October 1, 1980, was not executed by the Public Counsel. The parties executing the Stipulation proposed that an abbreviated or a partial hearing should be held

to determine if the Stipulation should be accepted or rejected, and if rejected, the hearing would go forward to a conclusion. A hearing was held on the 9th and 10th days of October, 1980, at which time the Public Counsel called, for cross-examination, witnesses of the other parties and offered his own case in opposition to the Stipulation and in support of his own proposed rate design. Oral argument was heard by the Commission on October 14, 1980, after which it was decided to accept the proposed Stipulation and Agreement in disposition of the issues in this case.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

The purpose of the instant case is the determination of the proper distribution of the Company's cost of service within the various classes of customers. The Commission, after considering the evidence offered on October 9 and 10, 1980, and the arguments of counsel on October 14, 1980, is of the opinion that the proposed Stipulation, although not joined in by all of the parties, represents the fairest and most equitable distribution of the rates authorized in Case No. GR-80-210.

The proceedings conducted in this matter provided the Commission with the opportunity to accept or reject the Stipulation. If the resolution of the case which was advocated by the signatories of the Stipulation was rejected, the case was to proceed to full hearing with all parties free to advocate their respective positions taken prior to the prehearing negotiations.

In determining that the Stipulation should be adopted, the Commission has taken into consideration that it resulted from extensive negotiations between groups with varying interests and economic positions. Not only have the negotiators included large-use industrial customers but also representatives of the City

of St. Louis with its cross section of citizenry as well as representatives of a neighborhood organization. In the Commission's opinion, the Stipulation attached hereto as Appendix A and offered by those diverse groups, represents a fair and reasonable distribution of the Company's rates and should be adopted in disposition of this matter.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions:

The Company is a public utility subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 1978.

The Commission, after notice and hearing, may order a change in any rate, charge, or rental, in any regulation or practice affecting such rate, charge, or rental, and it may determine and prescribe the lawful rate, charge or rental, and the lawful regulation or practice affecting such rate, charge, or rental thereafter to be observed.

The Commission may consider all facts, which in its judgment may have any bearing upon a proper determination of the price to be charged. The Commission is not bound by any Stipulation between the parties, however, such agreement should be given strong weight in disposing of outstanding issues.

Although the proposed Stipulation, offered in this case, was not executed by all parties, and in fact actively opposed by the Public Counsel, the Commission is of the opinion that the proposed rate design in the Stipulation presents the fairest and most equitable distribution of the Company's rates and should be the basis for disposition of the issues presented herein.

Formality or method of procedure is secondary to the goal of setting fair and reasonable rates and in the Commission's opin-

ion the collective recommendation of the majority of the parties in this matter, embodied in the Stipulation and Agreement, should be adopted.

It is, therefore,

ORDERED: 1. That the rate design contained in the Stipulation and Agreement received in this matter as Exhibit 18 and attached hereto as Appendix A be, and the same is, hereby adopted in disposition of all matters in this case.

ORDERED: 2. That Laclede Gas Company be, and is, hereby directed to file revised tariffs designed to implement the rate schedules set forth in Schedule 1 of Exhibit A attached to the Stipulation and Agreement, and that the tariffs herein authorized may be effective for gas bills based on meter readings on and after the effective date of this Report and Order.

ORDERED: 3. That this Report and Order shall become effective on the 15th day of November, 1980.

BY THE COMMISSION

/s/ D. Michael Hearst
Secretary

(SEAL)

Slavin, Chm., McCartney, Fraas,
Dority and Bryant, CC., Concur.

Dated at Jefferson City, Missouri,
this 15th day of October, 1980.

OPINION IN CASE NO. GO-78-38
LACLEDE GAS COMPANY

by

Alberta C. Slavin

My vote in support of a stipulated settlement in Case No. GO-78-38 requires an explanation in the light of my negative vote and dissenting opinion in Case No. GR-80-210, Laclede's revenue case.

Many months ago, the Commission set for hearing these two cases in tandem. It was the presumption of the Commission that rate redesign should be considered in the context of a proposed revenue change. The presumption again was that if the Commission approved a revenue increase that the new rate design could be applied to such an increase.

However, on September 24, 1980, the Commission was presented with a stipulated settlement in the revenue case. The rates in this proposed settlement were to become effective on October 10, 1980. The Commission had neither heard any evidence or received any proposed stipulated settlement in the rate design case.

When the Commission approved the stipulation, roughly $9,500,000 of the $13,400,000 allowed was allocated to the general or space heating customers of Laclede Gas Company. The increase went into effect on October 10, 1980, the beginning of the 1980-1981 heating season.

Some days after the Commission approved this revenue case stipulation over my dissenting vote, the Commission was presented with a stipulation in the Case No. GO-78-38, the rate design case. Public Counsel opposed the stipulation and requested an opportunity to go forward to present his evidence to the Commission. The Commission agreed to hear this evidence as well as testimony which attacked the stipulation. However,

the Commission did not have the authority to accept the case of the Public Counsel under this limited proceeding - only the right to accept or reject the stipulation and then go to full hearing on the matter.

My vote in support of the stipulation is principally because the stipulated rates can go into effect almost immediately, whereas if the Commission goes to full hearing to determine the merits of the case on full evidence, a decision which would take effect in this heating season is almost impossible. The pressure to arrive at the best possible solution based on the evidence was eliminated when the increase was permitted to go into effect on October 10. Therefore, the compromise rate design brought forward in the stipulation offers the most immediate solution to those ratepayers who are most adversely affected in the recent rate case decision.

Although the stipulation goes counter to some of the decisions reached in the area of rate design by the Commission in other gas rate design cases, it does offer some immediate relief to the space heating customers of Laclede Gas. Although the stipulation does consolidate schedules and divisions, it imposes an increase on general service customers which cannot be supported other than through this compromise. It leaves in place a declining block structure although modified, which is designed to protect the largest residential users of gas when more appropriate measures to protect these users might have been considered. These features represent the compromise of the parties involved.

My vote in support of the stipulation accepts those compromises despite my recognition that principles established in prior cases by this Commission might only be attained after lengthy proceedings and a long delay in providing relief to those who need it now.

/s/ Alberta C. Slavin, Chairman

APPENDIX A

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Case No. GO-78-38

In the Matter of the Rate Design
of Laclede Gas Company.

STIPULATION AND AGREEMENT

The parties and intervenors in Case No. GO-78-38 are: (1) the Staff of the Missouri Public Service Commission ("Staff"); (2) Laclede Gas Company ("Laclede"); (3) the Office of Public Counsel ("Public Counsel"); (4) the City of St. Louis ("City"); (5) Union Sarah Community Corporation ("Union Sarah"); (6) Utility Consumers' Counsel of Missouri, Inc. ("UCCM"); and (7) General Motors Corp., Monsanto Co., AFC Industries, Anheuser-Busch, Inc., McDonnell Douglas Corp., and Nooter Corp. ("Industrial Intervenors").

The parties to this Stipulation and Agreement are: (1) Laclede; (2) Staff; (3) City; (4) Industrial Intervenors; and (5) Union Sarah.

UCCM has not participated in any of the prehearing proceedings in Case No. GO-78-38, nor has UCCM filed any testimony or exhibits or indicated any intention to participate in any future proceedings in Case No. GO-78-38.

For the purposes of resolving all issues before the Missouri Public Service Commission (the "Commission") in Case No. GO-78-38, the undersigned parties and intervenors stipulate and agree as follows:

1. That the rate schedules contained in Exhibit A attached hereto, and made a part hereof, are intended to and shall be utilized to recover in full Laclede's total annual revenue requirement (including, but not limited to, the revenue increase authorized by the Commission in Case No. GR-80-210). Hereinafter, any reference to "this Stipulation and Agreement" shall be deemed for all purposes to include Exhibit A attached hereto.

2. That Laclede shall be authorized by the Commission to file revised tariffs desinged to implement the rate schedules expressly set forth in Schedule I of Exhibit A attached hereto, and made a part hereof.

3. That the revised tariffs referred to in Clause 2 of this Stipulation and Agreement shall become effective (provided the Commission acts expeditiously to accept this Stipulation and Agreement) no later than the December, 1980, cycle billing month. Laclede further agrees to use its best efforts to make said revised tariffs fully effective for gas bills based on meter readings taken on and after November 11, 1980, or as soon thereafter as practicable.

4. That the agreements and terms in this Stipulation and Agreement: (1) have resulted from extensive negotiations; (2) are interdependent; and (3) are for the sole purpose of disposing of Case No. GO-78-38. In the event the Commission does not, by its final Report and Order issued in Case No. GO-78-38, approve and adopt each and every specific agreement and term contained in this Stipulation and Agreement, this Stipulation And Agreement shall be void from its inception and none of the parties to this Stipulation and Agreement shall then be in any way prejudiced or bound by the agreements or terms of this Stipulation and Agreement: (1) in future proceedings in Case No. GO-78-38; or, (2) in any future proceeding, of whatever type or nature, before the Commission, any state or federal agency, or any court of law.

5. That none of the parties to this Stipulation and Agreement shall be deemed to have approved of, or acquiesced in, any gas utility rate design principle utilized in the settlement described in this Stipulation and Agreement.

6. That the prefiled direct and rebuttal testimony and exhibits of the witnesses appearing on behalf of the parties to this Stipulation and Agreement shall be received into evidence, without the necessity of the said witnesses taking the witness stand.

7. That in the event the Commission accepts each and every specific agreement and term contained in this Stipulation and Agreement and issues a Report and Order implementing the agreements and terms hereof, the parties to this Stipulation and Agreement waive:

A. The right to cross-examine the witnesses of the parties to this Stipulation and Agreement with respect to the prefiled direct and/or rebuttal testimony and exhibits of such witnesses;

B. The right pursuant to Section 536.080(1) RSMo. 1978* to present oral arguments or written briefs pertaining to the prefiled direct and rebuttal testimony and exhibits of the witnesses of the parties to this Stipulation and Agreement;

C. The right pursuant to Section 536.080(2) pertaining to the reading of the record by the Commission; and

D. The right pursuant to Section 386.510 pertaining to judicial review of the Commission's final Report and Order in Case No. GO-78-38.

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* Hereinafter reference to RSMo. 1978 shall be by section number only.

8. That the parties to this Stipulation and Agreement expressly do not waive any of the rights referred to in clauses 6 and 7 of this Stipulation and Agreement as such rights may apply to any prefiled direct and rebuttal testimony and exhibits of any parties and/or intervenors in Case No. GO-78-38 who are not parties to this Stipulation and Agreement.

9. That all parties to Case No. GO-78-38 are not parties to this Stipulation and Agreement ("non-signing parties"), and that it is not the intent of the parties to this Stipulation and Agreement to, in any way, preclude or deny, or cause the Commission to preclude or deny, to any non-signing party its right to substantive or procedural due process of law or any rights such non-signing party may have or be entitled to in this proceeding before this Commission, including, but not limited to, the right to: (1) present in full, or in part, such non-signing party's case; and (2) cross-examine any witness of any party to this Stipulation and Agreement on any matter pending before the Commission in Case No. GO-78-38.

10. That the Commission will, after any non-signing party has been accorded its right to substantive and procedural due process of law as more fully described in Clause 9 of this Stipulation and Agreement, enter its order either approving or rejecting this Stipulation and Agreement; provided, that in the event the Commission decides in its order to reject this Stipulation and Agreement, the hearing in Case No. GO-78-38 will resume on October 9, 1980, at which time *all* parties to Case No. GO-78-38 will be accorded the right to a full and contested hearing on the merits and issues contained in, or hereinafter arising in, Case No. GO-78-38.

11. That Schedules II, III, and IV of Exhibit A, attached to and made a part of this Stipulation and Agreement, are offered to the Commission in support of and as an explanation of the rate design described in this Stipulation and Agreement.

Respectfully submitted,

Missouri Public Service
Commission Staff
Treva J. Hearne
Assistant General Counsel
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Laclede Gas Company
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Union Sarah Community Corp.
Freeman Bosley, Atty. at Law
Legal Services of Eastern
Missouri, Inc.
607 North Grand Boulevard
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Mo PSC Case No. GO-78-38
Stipulation and Agreement
Exhibit A
Schedule I

LACLEDE GAS COMPANY

SUMMARY OF PROPOSED BASE TARIFF RATES INCLUDING GR 80-210 RATE INCREASE

PROPOSED RATE CLASSES		LACLEDE & ST. CHARLES DIVISIONS	MISSOURI NATURAL & MIDWEST MISSOURI DIVISIONS
General Service	Customer Charge/Month	$3.50	$3.50
	Commodity Charge/Therm	25.344¢	27.575¢
General Space Heating	Customer Charge/Month	$3.50	$3.50
	Commodity Charge/Therm		
	1st. 65 Therms	25.344¢	27.575¢
	All Over 65 Therms	22.622¢	24.878¢
Seasonal Service (May through October)	Customer Charge/Month	$3.50	$3.50
	Commodity Charge/Therm		
	1st. 65 Therms	25.344¢	27.575¢
	All Over 65 Therms	17.892¢	17.892¢

Large Volume Service	Customer Charge/Month	$240	$240
	Demand Charge/Month/Therm	45¢	45¢
	Commodity Charge/Therm	16.957¢	17.509¢
Interruptible Service	Customer Charge/Month	$240	$240
	Commodity Charge/Therm	18.148¢	18.700¢
General L.P. Gas Service	Customer Charge/Month	$3.50	$3.50
	Commodity Charge/Gallon	54.284¢	54.284¢
Unmetered Gas Light Service	Customer Charge/Month	$1.50	$1.50
	1st. Mantle Unit/Light/Month	$5.32	$5.32
	Ea. Addl. Mantle Unit/Light/Mo.	$3.77	$3.77

Mo PSC Case No. GO-78-38
Stipulation and Agreement
Exhibit A
Schedule II

LACLEDE GAS COMPANY

EXPLANATION AND SUMMARY OF STIPULATED RATE DESIGN CHANGES

General

The rate classes and charges for gas service set out in Schedule 1 hereof are designed to replace all of the tariff schedules of the Company which will be effective October 10, 1980 per Commission Report and Order dated September 24, 1980 in Case No. GR-80-210. The proposed Schedule 1 rates include specific agreements of the parties to the Stipulation as to (i) consolidation and changes in rate level differentials among the Company's four operating divisions, (ii) consolidation of rate classes on a uniform system-wide basis, (iii) the basic structure and level of rates for each customer class and (iv) the allocation of the $13,338,153 rate increase granted the Company in Case No. GR-80-210.

1) Consolidation and Changes in Rate Differential by Division

The proposed Schedule 1 rates provide for two divisional tariff levels in lieu of the presently existing four totally different tariff schedules. Under the proposal, the Laclede and St. Charles divisions are combined under one uniform set of rates and the Midwest Missouri and Missouri Natural divisions are combined under a second set of rates.

As shown on Schedule 111, the overall St. Charles division rate level is reduced by $286,700 annually under the Laclede-St. Charles combined schedules. The overall rate level in the Missouri Natural division is decreased by $434,100 annually and the Midwest Missouri division increased by $185,600 annually under the proposed combined schedules, a net decrease of $248,500 annually. The resulting combined Missouri Natural-Midwest Missouri charges are approximately $1,200,000 annually above that which would be produced under the Laclede-St. Charles rate schedules.

2) Consolidation of Rate Classes

The tariff rate classes have been redefined to provide for seven basic service classifications as shown on Schedule 1, which classes will be uniform in all divisions. The present tariffs contain 27 different service classifications.

3) Proposed Rate Structure

The proposed rates applicable to most customers contain a customer charge component of $3.50 per month. The $3.50 customer charge is below the full cost-of-service customer charge to mitigate the adverse impact of the full cost-of-service customer charge on small users. The large usage classes (large volume and interruptible) have a full customer charge of $240 per month. The additional revenues for each class of services are collected on a commodity charge of either a single flat rate or a two block rate, and in the case of large volume customers, an additional single flat demand charge.

General service (non-space heating) customers as well as large volume and interruptible customers are on a single flat commodity rate. In the case of the general service customer, a portion of the full cost-of-service charge is being collected in the commodity charge. General space heating customers are on a two block rate that is designed so that the first block will cover most non-heating use (65 therms/month), and is priced at the same rate as the general service customer. Thus, for non-heating use, both customers are on the same rate. The second block is priced to recover the remaining revenues for space heating customers. Although the second block rate is lower than the first block rate, a portion of the full cost-of-service customer charge is being collected in the second block.

Seasonal service rates are constructed in a similar fashion to general space heating rates with the first 65 therms (non-cooling use) priced at the general service rates, and the second block priced to collect the remaining revenues. Large volume and in-

terruptible rates are single flat commodity charges set to collect revenues remaining after the customer and (for large volume customers only) the demand charge. General L.P. Gas service and unmetered gas light service rates are increased to reflect a higher cost-of-service.

On an aggregate company wide basis, the following revenue shifts among class of service are reflected by this proposed rate structure:

Rate Class	Increase (Decrease) Annual Revenue	
	$	%
General Service	417,400	+3.90
General Space Heating	(1,144,600)	−0.51
Seasonal Service	15,800	+0.87
Large Volume Service	402,200	+0.80
Interruptible Service	137,700	+1.44
General L. P. Gas Service	70,600	+20.35
Unmetered Gas Light Service	46,200	+64.26
Special Contracts	46,900	+1.01
Sales for Resale	5,300	+0.78
	-2,500	

To see revenue shifts by division, see Schedule III. To see impact on general space heating customers by division, see Schedule IV.

4) Allocation of GR-80-210 Rate Increase

The proposed rates set out herein reflect the addition of the $13,388,153 rate increase granted in Case No. GR-80-210 and specifically result from allocation of such increase on a uniform per therm basis to the redesigned service classifications. The comparison shown for present rates reflect the uniform percentage allocation prescribed at GR-80-210.

Mo PSC Case No. GO-78-38
Stipulation and Agreement
Exhibit A
Schedule III

LACLEDE GAS COMPANY

Comparison of Revenue by Proposed Rate Classes
Present and Proposed Base Tariff Rates
Including GR-80-210 Rate Increase

Proposed Rate Classes	Revenue At Present Rates ($000)	Revenue At Proposed Rates ($000)	Revenue Increase (Decrease) ($000)
LACLEDE DIVISION			
General Service	10,216.1	10,599.8	383.7
General Space Heating	200,597.3	199,981.9	(615.4)
Seasonal	1,625.7	1,665.9	40.2
Large Volume	47,483.9	47,951.1	467.2
Interruptible	8,780.9	8,909.3	128.4
General L.P. Gas	169.1	206.4	37.3
Unmetered Gas Light	68.7	113.1	44.4
Special Contracts	4,628.7	4,675.6	46.9
Total	273,570.4	274,103.1	532.7
ST. CHARLES DIVISION			
General Service	158.6	157.3	(1.3)
General Space Heating	9,514.7	9,195.1	(319.6)
Seasonal	9.7	9.4	(0.3)
Large Volume	749.8	780.9	31.1
Interruptible	120.7	117.0	(3.7)
Unmetered Gas Light	3.2	5.0	1.8
Sales for Resale	677.5	682.8	5.3
Total	11,234.2	10,947.5	(286.7)

MISSOURI NATURAL DIV.			
General Service	301.2	332.0	30.8
General Space Heating	10,972.6	10,593.3	(379.3)
Seasonal	167.6	143.0	(24.6)
Large Volume	2,167.8	2,093.8	(74.0)
Interruptible	650.4	663.4	13.0
Total	14,259.6	13,825.5	(434.1)
MIDWEST MISSOURI DIV.			
General Service	24.3	28.5	4.2
General Space Heating	3,125.3	3,295.0	169.7
Seasonal	4.6	5.1	0.5
Large Volume	143.4	121.3	(22.1)
General L.P. Gas	177.9	211.2	33.3
Total	3,475.5	3,661.1	185.6
TOTAL COMPANY	302,539.7	302,537.2	(2.5)

Mo PSC Case No. GO-78-38
Stipulation and Agreement
Exhibit A
Schedule IV

Bill Level Comparison
General Space Heating Rate
Laclede Division

Usage Level (Therms)	Present Rates	Proposed Rates	Increase (Decrease)	% Incr. (Decr.)
25	$ 11.17	$ 12.63	$ 1.46	13.0%
50	21.11	21.75	.64	3.0
100	39.12	39.05	.07	(0.2)
200	73.79	72.84	(.95)	(1.3)
350	125.80	123.52	(2.28)	(1.8)
700	247.16	241.76	(5.40)	(2.2)
1000	351.18	343.12	(8.06)	(2.3)
1500	524.55	512.04	(12.51)	(2.4)

Bill Level Comparison
General Space Heating Rate
St. Charles Division

Usage Level (Therms)	Present Rates	Proposed Rates	Increase (Decrease)	% Incr. (Decr.)
25	$ 11.84	$ 12.63	$ .79	6.7%
50	21.15	21.75	.60	2.8
100	38.59	39.05	.46	1.2
200	73.62	72.84	(.78)	(1.1)
350	126.45	123.52	(2.93)	(2.3)
700	249.75	241.76	(7.99)	(3.2)
1000	355.42	343.12	(12.30)	(3.5)
1500	531.55	512.04	(19.51)	(3.7)

Bill Level Comparison
General Space Heating Rate
Midwest Missouri Division

Usage Level (Therms)	Present Rates	Proposed Rates	Increase (Decrease)	% Incr. (Decr.)
25	$ 10.89	$ 13.18	$ 2.29	21.0%
50	20.99	22.87	1.88	9.0
100	39.01	41.29	2.28	5.8
200	73.64	77.34	3.70	5.0
350	125.86	131.40	5.54	4.4
700	247.69	257.54	9.85	4.0
1000	352.12	365.66	13.54	3.8
1500	526.17	545.87	19.70	3.7

Bill Level Comparison
General Space Heating Rate
Missouri Natural Division

Usage Level (Therms)	Present Rates	Proposed Rates	Increase (Decrease)	% Incr. (Decr.)
25	$ 12.11	$ 13.18	$ 1.07	8.8%
50	22.67	22.87	.20	0.9
100	42.48	41.29	(1.19)	(2.8)
200	79.14	77.34	(1.80)	(2.3)
350	134.13	131.40	(2.73)	(2.0)
700	262.45	257.54	(4.91)	(1.9)
1000	372.43	365.66	(6.77)	(1.8)
1500	555.73	545.87	(9.86)	(1.8)

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, this 15th day of October 1980

/s/ D. Michael Hearst
Secretary

Office - Supreme Court, U.S.
FILED
JUN 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1906

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LACLEDE GAS COMPANY,
Petitioner,

v.

OFFICE OF THE PUBLIC COUNSEL OF THE STATE OF MISSOURI,
Respondent,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED

Whether the decision of the Public Service Commission of Missouri dated October 15, 1980, in "*In the matter of rate design of Laclede Gas Company,* Case No. GO-78-38" is lawful and reasonable under Missouri law; whether the limited hearing procedure adopted by the Public Service Commission:

a) is authorized by any Missouri statutory provision;

b) affords parties to the administrative proceedings the opportunity to exercise those procedural rights guaranteed by Missouri law;

c) provides the courts and the parties an adequate basis for determining the reasonableness of the Commission's decision;

whether the decision is based upon competent and substantial evidence as required by Missouri law.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Court below were James M. Fischer, Public Counsel for the State of Missouri, the Public Service Commission of Missouri, and Laclede Gas Company.

TABLE OF CONTENTS AND AUTHORITIES

Page

Questions Presented I

Parties to the Proceedings I

Table of Contents and Authorities III

Statement of the Case 1

Reasons for Denying the Writ

1. The Petitioner has not demonstrated that the State Court's decision turned upon a federal question that was actually passed upon and decided 8

2. Even if the State Court decided a federal question, this Court should not grant a Writ Of Certiorari since the lower Court decision rests on the following independent, nonfederal grounds:

   a) The limited hearing procedure used in this case was unauthorized by statute; and

   b) The Commission failed to decide the case based upon the competent and substantial evidence 10

3. The State Court's decision is not inconsistent with applicable decisions of this Court or other Federal Courts 11

4. The State Court's decision will not have a chilling effect on the parties' ability to settle and compromise their cases before the Commission ..14

Conclusion 18

CITATIONS

Cases:

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 11

Bolling v. Lersner, 91 U.S. 594 (1876) 8

Broad River Power Co. v. State ex rel. Daniel, 281 U.S. 537, aff'd on rehearing, 282 U.S. 187 (1930) 11

Commercial Bank v. Rochester, 82 U.S. (15 Wall.) 639 (1873) 8

Consolidated Turnpike Co. v. Norfolk O.V.Ry., 228 U.S. 326 (1913) 9

Detroit City Ry. v. Guthard, 114 U.S. 133 (1885) 8

Frozen Foods Express, Inc. v. United States, 328 F.Supp. 666, 670 (N.D. Tex. 1971) 15

Independent Bankers Association v. Board of Governors, 516 F.2d 1206, 1220 (D.C. Cir. 1975) 13

Inexco Oil Co. v. Corporation Commission, 628 P.2d 362, 364 (Okla. 1981) 13

In Re Hugoton-Andarko Area Rate Case; the People of the State of California v. Federal Power Commission, 466 F.2d 974 (9th Cir. 1972) 12, 13

In Re Martigney Creek Sewer Co., Case No. SR-82-166 (Mo.P.S.C. March 4, 1983) 17

In Re Saline Sewer Co., Case No. SR-82-262 (Mo.P.S.C. December 22, 1983) 17

Live Oak Water Users' Association v. Railroad Commission, 269 U.S. 354 (1926) 10

Metropolitan Washington Board of Trade v. Public Service Commission, 432 A.2d 343, 361-63 (D.C.App. 1981) 12

Mobil Oil Corporation v. Federal Power Commission, 417 U.S. 283, 312-14 (1974) 12, 13

Pennsylvania Gas & Water Co. v. Federal Power Commission, 463 F.2d 1242 (D.C. Cir. 1972) 12

Placid Oil Co. v. Federal Power Commission, 483 F.2d 880, 893 (5th Cir. 1973) 12, 13

State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39 (Mo.App. 1982) 6, 10, 11, 14, 16

State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. banc 1979) 15

Mo. Const. art I, § 10 9

Section 386.130, RSMo 1978 6

Section 386.410, RSMo 1978 .....6, 10

Section 386.420, RSMo 1978 .....6, 14

Section 386.710, RSMo 1978 2

Section 536.063(3), RSMo 1978 14

Section 536.070(2), RSMo 1978 14

Section 536.080, RSMo 1978 .....6, 14

No. 82-1906

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LACLEDE GAS COMPANY,
Petitioner,

v.

OFFICE OF THE PUBLIC COUNSEL OF THE STATE OF MISSOURI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Respondent Office of the Public Counsel of the State of Missouri (hereinafter "Respondent" or "Public Counsel") respectfully requests that this Court deny Petitioner's request for a writ of certiorari in this matter.

STATEMENT OF CASE

Petitioner's Statement Of Case does not contain a concise statement of the case containing all that is material to the consideration of the issues presented, as required by U.S. Sup. Ct. Rule 21.1(g). The Public Counsel, therefore, respectfully submits the following Statement Of Case for consideration by the Court.

On August 15, 1977, the Public Service Commission of the State of Missouri (hereinafter "Commission"), *sua sponte*, instituted "In the matter of the rate design of Laclede Gas Company, Case No. GO-78-38" to investigate the rate design of Laclede Gas Company (hereinafter "Company" or "Petitioner").

The Public Counsel participated throughout the proceeding in his capacity as the statutory representative of the public in any proceeding before the Commission. Section 386.710(1)(2), RSMo 1978.[1] Representatives of the Company and the Commission's General Counsel and technical staff also participated throughout the proceeding.

On May 25, 1978, the Commission granted the petitions for intervention of the following parties: City of St. Louis, Union Sarah Community Corporation, a community service corporation in the St. Louis metropolitan area representing low income consumers, and a group of industrial intervenors including General Motors Corporation, Monsanto Company, ACF Industries, Inc., Anheuser-Busch, Inc., McDonnell Douglas Corporation and Nooter Corporation (hereinafter "Industrial Intervenors").

Pursuant to various orders of the Commission, the Company, Public Counsel, Commission Staff and Industrial Intervenors filed their prepared testimony and exhibits with the Commission prior to the scheduling hearings.

On September 9, 1980, local hearings were held in St. Louis and Clayton, Missouri, for the purpose of considering the testimony of the general public in Case No. GO-78-38 heard on a consolidated record with Case No. GR-80-210, the Company's 1980 general rate case.

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[1]All statutory references are to RSMo 1978, as amended, unless otherwise indicated.

After the prehearing conference which began on September 15, 1980, some of the parties reached a compromise regarding the rate design issues involved in Case No. GO-78-38. On October 1, 1980, all parties, except the Public Counsel, executed and filed a Stipulation and Agreement with the Commission which contained joint recommendations of the signatory parties regarding the class revenue allocations and rate design for the Company. (Petitioner's Brief for Certiorari at Appendix D, A-19)

In the Stipulation and Agreement, the signatory parties proposed that the Commission approve the following annual revenue increases (decreases) for the various customer classes:

Customer Class	*Annual Revenue Increase (Decrease)*
General Service	$ 417,400
General Space Heating	(1,144,600)
Seasonal Service	15,800
Large Volume Service	402,200
Interruptible Service	137,700
General L.P. Gas Service	70,600
Unmetered Gas Light Service	46,200
Special Contracts	46,900
Sales for Resale	5,300

The signatory parties also included in the stipulation specific rates to recover the class revenue allocation. The rate structures proposed by the signatory parties for the general space heating and seasonal service customer classes were in the form of declining block rates. (*Id.* at A-24)

The Public Counsel did not join in the Stipulation and Agreement and at all times made it clear to all parties that he would not agree to a disposition of the case on the basis of the stipulation.

The Public Counsel appeared before the Commission on October 9-10, 1980, the time established for the hearing, prepared to present his affirmative case and recommendations and otherwise exercise his procedural rights secured by the Missouri Constitution, Chapters 386, 393 and 536, RSMo 1978, and 4 CSR 240-2.010 *et seq.* However, the Commission, over the objections of the Public Counsel, adopted a "limited hearing procedure" set forth in paragraphs 9 and 10 of the Stipulation and Agreement. (Petitioner's Brief for Certiorari at Appendix D, A-22)

Under the limited hearing procedure, the Commission ruled that the only issue to be considered in the hearing was whether the joint recommendation contained in the stipulation should be accepted or rejected; the hearing would not consider whether the Public Counsel's proposed rate design was in the public interest. If the Commission had rejected the joint recommendation contained in the Stipulation and Agreement, a subsequent hearing apparently would have been held to consider the Public Counsel's evidence and to afford the signatories to the Stipulation and Agreement the right to a full and contested hearing on the merits and issues arising in Case No. GO-78-38. Since the Commission accepted the terms of the Stipulation and Agreement after the limited hearing, no subsequent hearings were held. No hearing was held to consider the merits of the Public Counsel's proposed rate design or alternative rate designs.[2]

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[2]The Commission's Report and Order described the limited hearing procedure as follows:

> As a result of a further prehearing conference, five of the six active parties in the instant case executed a proposed Stipulation and Agreement. The Stipulation, filed October 1, 1980, was not executed by the Public Counsel. The parties executing the Stipulation proposed that an abbreviated or a partial hearing should be held to determine if the Stipulation should be

(Continued on next page)

Under the limited hearing procedure, the Commission permitted the Public Counsel to cross-examine opposing witnesses concerning their prepared testimonies and the terms of the stipulation. The Public Counsel was also permitted to present his expert witness who prepared and filed testimony and exhibits. However, since the Commission had ruled that the only issue before it was whether the joint recommendation contained in the Stipulation and Agreement should be accepted or rejected, the signatory parties waived cross-examination of the Public Counsel's witness, but reserved the right to recall the witness for the purpose of cross-examination if the Commission rejected the terms of the Stipulation and Agreement.[3]

On October 14, 1980, the Commission held oral arguments in the matter. After the oral arguments concluded, a brief recess was taken by the Commission. When the proceeding commenced, the hearing examiner announced on the record that the Commission had voted (5-0) to dispose

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Footnote continued

> accepted or rejected, and if rejected, the hearing would go forward to a conclusion. (Petitioner's Brief for Certiorari at Appendix D, A-13–A-14)

The concurring opinion of Commissioner Slavin also described the limited hearing procedure:

> Public Counsel opposed the stipulation and requested an opportunity to go forward to present his evidence to the Commission. The Commission agreed to hear this evidence as well as testimony which attacked the stipulation. However, the Commission did not have the authority to accept the case of the Public Counsel under this limited proceeding–only the right to accept or reject the stipulation and then go to full hearing on the matter. (Petitioner's Brief for Certiorari at Appendix D, A-17–A-18)

[3]Counsel for Union Sarah Community Corporation asked the Public Counsel's witness approximately twelve questions before reserving the right to recall the witness, if the Commission rejected the terms of the Stipulation and Agreement.

of the matter under the terms proposed in the Stipulation and Agreement.

On October 15, 1980, the Commission issued its Report and Order adopting the class revenue allocations and rate designs proposed in the Stipulation and Agreement. The Commission ordered the Company to file revised tariffs designed to implement the rate schedules contained in the Stipulation and Agreement for gas bills based on meter readings on and after the effective date of the order (i.e., November 15, 1980). The Report and Order did not contain a certification of compliance with Sections 386.130 and 536.080(2). On October 23, 1980, transcripts of the proceedings were filed with the Secretary of the Commission and served upon the parties.

On December 17, 1980, the Company submitted new tariff sheets containing the rates adopted by the Commission in its Report and Order. On December 22, 1980, the Commission issued its Order Approving Tariff Sheets which approved the revised rates.

The Circuit Court of Cole County upheld the validity of the order. On appeal, however, the Missouri Court of Appeals, Western District, held that the limited hearing procedure used by the Commission was not authorized by Missouri law. *State ex rel. Fischer* v. *Public Service Commission et al.*, 645 S.W.2d 39 (Mo.App. 1982) The court specifically rejected the arguments of the Commission that Section 386.410 supported the limited hearing procedure. *Id.* at 42. The court also found that the Commission's order did not meet the statutory requirement of Section 386.420 to include findings of fact in all written reports. *Id.* at 42. Finally, the court discussed the requirements of due process, stating:

> Due process requires that administrative hearings be fair and consistent with rudimentary elements of

fair play. *Tonkin* v. *Jackson County Merit System Commission*, 599 S.W.2d 25, 32-33[7] (Mo.App. 1980) and *Jones* v. *State Department of Public Health and Welfare*, 354 S.W.2d 37, 39-40[2] (Mo.App. 1962). One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. *Merry Heart Nursing and Convalescent Home, Inc.* v. *Dougherty*, 131 N.J.Super. 412, 330 A.2d 370, 373-374[7] (1974).

The hearing procedure followed in this case failed to satisfy the due process requirement. Although Public Counsel was allowed to present his rate design proposal and to cross-examine the opposing witnesses, the Commission had previously decided that the only issue it would consider was whether or not to approve the stipulation and agreement. In light of this decision, the hearing afforded Public Counsel was not meaningful, in that the Commission was precluded from approving anything but the stipulated rate design in the course of the hearing in question. The question properly before the Commission was what rate design to adopt, rather than whether or not to adopt one particular proposal. Thus, the hearing procedure adopted in this case was a violation of the due process which should be accorded to Public Counsel in his capacity as the representative of the public. *Id.* at 43.

On February 23, 1983, the Supreme Court of Missouri entered its order denying Petitioner's application to review the decision of the Missouri Court of Appeals.

REASONS FOR DENYING THE WRIT

1. The Petitioner has not demonstrated that the state court's decision turned upon a federal question that was actually passed upon and decided.

It is a settled rule of law that the Petitioner must demonstrate that the state court actually decided the federal question presented before this Court has jurisdiction to review the matter. *Commercial Bank* v. *Rochester*, 82 U.S. (15 Wall.) 639 (1873); *Detroit City Ry.* v. *Guthard*, 114 U.S. 133 (1885); *Bolling* v. *Lersner*, 91 U.S. 594 (1876).

It is not clear in the case at hand that the state court was presented with a federal question. Contrary to the assertion on page 4 of its Petitioner's Brief for Certiorari, the Public Counsel did not expressly argue before the Missouri Court of Appeals that the procedures utilized by the Commission violated the due process clause of the Fourteenth Amendment to the United States Constitution. Although the Public Counsel's Brief before the Missouri Court of Appeals cited several cases applying the due process clause of the Fourteenth Amendment to the United States Constitution, the Public Counsel's Brief at page 58 specifically stated:

> These decisions are not cited in an effort to argue that the procedural rights of parties to Commission proceedings are constitutionally mandated. Rather, they are merely presented as an illustration of the importance which courts have attached to the protection of procedural rights in administrative proceedings. Since the legislature has expressed many of the same concerns through the enactment of various procedural laws, an awareness of the considerations underlying these constitutional developments can be useful in ascertaining the intended scope and effect of those legislative initiatives in the same area.

> In the Administrative Procedures and Review Act, Section 536 et seq., the Missouri legislature has set out in elaborate detail the procedural formalities and rights that must be observed in those instances where an administrative hearing is required by statute. What must be determined here, therefore, is whether the procedural rights afforded by the limited hearing approach are an adequate substitute for those procedural hearing rights specifically guaranteed by the Act. For "the cardinal test of the presence or absence of due process of law in an administrative proceeding is the presence or absence of rudiments of fair play long known to the law, *and whether a person has been denied due process of law by the action of an administrative body depends on whether it acted contrary to the statutes and rules* and with arbitrary discrimination." 16A C.J.S. Constitutional Law § 628 p. 851 (citations omitted) (emphasis added).

Nor is it clear from the opinion of the Missouri Court of Appeals that its decision was based upon the due process clause of the Fourteenth Amendment of the United States Constitution. As noted in Petitioner's Brief for Certiorari at 5, n.1, the court did not explicitly state that its decision was based upon the federal constitution rather than Article I, Section 10 of the Missouri Constitution.[4]

In *Consolidated Turnpike Co.* v. *Norfolk & O.V.Ry.*, 228 U.S. 326 (1913), it was held that an asserted right to just compensation for improvements in eminent domain proceedings did not necessarily present a federal question under the due process clause of the Fourteenth Amendment where due process of law was guaranteed by the state con-

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[4]Article I, Section 10 of the Missouri Constitution states:

> That no person shall be deprived of life, liberty or property without due process of law.

stitution and the case might well have been litigated wholly upon local law. *See also Live Oak Water Users' Association* v. *Railroad Commission*, 269 U.S. 354 (1926).

Since the Petitioner has not clearly demonstrated that a federal question actually arose, and was passed upon and decided by the Missouri Court of Appeals or the Missouri Supreme Court, this Court should decline to issue the requested writ.

2. Even if the Missouri Court of Appeals decided a federal question, this Court should not grant a writ of certiorari since the lower court decision clearly rests upon independent, nonfederal grounds.

In addition to addressing the due process issue, the Missouri Court of Appeals issued two holdings which constitute independent, nonfederal grounds for its order reversing and remanding this case for additional proceedings before the Commission. First, the court held that "the limited hearing procedure used in this case was unauthorized." 645 S.W.2d at 44. The court specifically rejected the Commission's position that Section 386.410 gives it unlimited discretion to conduct its hearings in any possible manner. Instead, the court found that Section 386.410 gives the Commission flexibility in its proceedings, provided that the Commission first satisfied all other statutory requirements. *Id.* at 42.

Secondly, the court found that the Commission, rather than performing its statutory duty to fix gas rates based upon findings of fact supported by competent and substantial evidence simply adopted the stipulation agreement, thus violating Section 386.420 and rendering its subsequent order invalid. *Id.* at 43. Specifically, the court noted that "the adoption of declining block rates for general space heating and seasonal service classes also seems to have been made without evidentiary support. . ." *Id.* The court

also seemed to question the evidentiary basis and findings of fact concerning the Commission's decision to increase the class revenue requirement for the general service class by $417,000 and decrease the class revenue requirement for the general space heating class by $1,144,600. *Id.* Either nonfederal ground—lack of statutory authority for the limited hearing procedure, or failure to decide the case based upon the competent and substantial evidence in the whole record—is sufficient in itself to sustain the judgment of the Missouri Court of Appeals and the February 23, 1983, order of the Missouri Supreme Court denying Petitioner's application for transfer of this case.

This Court should not pass on federal questions discussed in a state court opinion where it appears that the judgment embodied in the opinion rests on adequate state grounds. *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956); *Broad River Power Company* v. *State ex rel. Daniel*, 281 U.S. 537, *affirmed* 282 U.S. 187 (1930).

Since the record in this case clearly demonstrates that the state court decision was rendered upon independent, nonfederal grounds which were sufficient to sustain it, this Court should not grant Petitioner's request for a writ of certiorari.

3. The decision below is not inconsistent with applicable decisions of this Court or other federal courts.

Petitioner cites a number of federal cases which have addressed the authority of administrative agencies to adopt non-unanimous stipulation and agreements and asserts that the decision below is in direct conflict with them. (Petitioner's Brief for Certiorari at 7-10) This contention is patently fallacious. The cited federal cases support the holding of the Missouri Court of Appeals that the Commission unlawfully relied on the non-unanimous stipulation and agreement approved by it in this case.

Under the procedures upheld in *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283, 312-14 (1974), *Placid Oil Co.* v. *Federal Power Commission*, 483 F.2d 893 (5th Cir. 1973), *In Re Hugoton-Andarko Area Rate Case; the People of the State of California* v. *Federal Power Commission*, 466 F.2d 974 (9th Cir. 1972), *Pennsylvania Gas & Water Co.* v. *Federal Power Commission*, 463 F.2d 1242 (D.C. Cir. 1972), and *Metropolitan Washington Board of Trade* v. *Public Service Commission*, 432 A.2d 343, 361-63 (D.C. App. 1981), the administrative agencies considered the evidence and positions of the non-signatory parties as well as the joint recommendations contained in the stipulation. Unlike the limited hearing procedure held unlawful in this case, the administrative agencies in the cases cited by Petitioner were not forced to accept or reject the terms of the stipulation before the regulatory agencies could consider the evidence and positions of the non-signatory parties. The administrative agencies would not have been precluded from adopting the non-signatory parties' position, provided it was supported by substantial evidence.

Where reliance on non-unanimous settlement agreements have been sanctioned, the courts have generally emphasized the fact that the administrative body had detailed the factual basis and policy considerations underlying its reasons for adopting the agreement and rejecting alternative positions. Thus, in upholding the FPC's adoption of a non-unanimous settlement agreement, this Court stated in *Mobil Oil Corporation* v. *Federal Power Commission*, *supra* at 312-14:

> The Commission clearly had the power to admit the agreement into the record—indeed, it was obligated to consider it. That it was admitted for the record did not, of course, establish without more the justness and reasonableness of its terms. But the Com-

mission did not treat it as such. As we have noted, the Commision weighed its terms by reference to the entire record in the Southern Louisiana area proceeding since 1961, and further supplemented that record with extensive testimony and exhibits directed at the proposal's terms. We think that the Court of Appeals correctly analyzed the situation and stated the correct legal principles:

> "No one seriously doubts the power—indeed, the duty—of FPC to consider the terms of a proposed settlement which fails to receive unanimous support as a decision on the merits. We agree with the D.C. Circuit that even "assuming that under the Commission's rules [a party's] rejection of the settlement rendered the proposal ineffective *as a settlement,* it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits.' Michigan Consolidated Gas Co.* v. *FPC,* 1960, 108 US App DC 409, 283 F2d 204, 222 . . . ." (footnotes omitted)

See also Placid Oil Co. v. *Federal Power Commission, supra* at 893; *In Re Hugoton-Andarko Area Rate Case; the People of the State of California* v. *Federal Power Commission, supra* at 980; *Independent Bankers Association* v. *Board of Governors,* 516 F.2d 1206, 1220 (D.C. Cir. 1975); *Inexco Oil Company* v. *Corporation Commission,* 628 P.2d 362, 364 (Okla. 1981).

It is difficult to ascertain how the Commission decision in this case can be said to have conformed to the standard described above. As the Missouri Court of Appeals opinion noted, the Commission's findings were completely conclusory, and did not provide any insights whatsoever into if and how controlling issues were resolved. 645 S.W.2d at 42. In addition, the court found little, if any, evidentiary

support for several portions of the Commission's decision. *Id.*

In summary, the decisions cited by the Petitioner have held that even though an administrative decision incorporates a non-unanimous settlement agreement, the decision must still be based on substantial evidence. The procedure must not be designed to preclude the consideration and adoption of the non-signatory party's position, if it is supported by competent and substantial evidence. As the Missouri Court of Appeals noted in its opinion:

> The question properly before the Commission was what rate design to adopt, rather than whether or not to adopt one particular proposal. Thus, the hearing procedure adopted in this case was a violation of due process which should be accorded to Public Counsel in his capacity as the representative of the public. 645 S.W.2d at 43.

The above due process rights, among others, are expressly guaranteed by statute, *See* Sections 386.420(1), 536.063(3), 536.070(2), 536.080, and the Missouri Court of Appeals was entirely correct in holding that they were violated by the limited hearing procedure adopted in this case.

Since the decision of the Missouri Court of Appeals is not inconsistent or in conflict with applicable decisions of this Court or other federal courts, Petitioner's request for a writ of certiorari should be denied.

4. The decision of the Missouri Court of Appeals will not have a chilling effect on the parties' ability to settle and compromise their cases before the Commission.

Petitioner is apparently concerned that the Missouri Court of Appeals' decision will have an adverse effect on the Commission's ability to perform expeditiously its regulatory role. As reflected in the lower court's opinion,

however, considerations of convenience and expediency do not determine whether an act of the Commission is authorized by statute. 645 S.W.2d at 43. *See also State ex rel. Utility Consumers Council of Missouri* v. *Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979). Although the limited hearing procedure may be convenient, its use by the Commission is nevertheless inconsistent with that regulatory body's statutory duty to establish reasonable rates based on an exacting and equitable consideration of all relevant factors and policy concerns.

Statutory requirements that the Commission's decision be based on substantial evidence and that it make findings of fact and master the record, are all designed to ensure that such a process is followed when new rates are established. Moreover, the responsibility of making such determinations rests exclusively with the Commission and may not be abdicated or delegated for the sake of convenience or expediency. As the court stated in *Frozen Foods Express, Inc.* v. *United States*, 328 F.Supp. 666, 670 (N.D. Tex. 1971):

> [A]n application before the ICC is unlike pleadings and motions tendered in a lawsuit. Courts will normally accept the stipulations and restrictions under which the parties agree to try a case. A court's function, under the adversary system, is to resolve the dispute as it is presented by the parties. The court will not superimpose the interests of a third party upon the litigants unless, in those rare instances, their interests run afoul of what is called 'public policy.'
>
> The ICC on the other hand, is required to represent the public, a third party, when it grants or denies certificates of public convenience and necessity. In this capacity it cannot defer to the parties and permit them to define the metes and bounds of the controversy.

In this case, the Commission was apparently content to abdicate its responsibility to determine just and reasonable rates and instead permit some of the parties to assume its role as arbiter of the public interest. Since a majority of the parties had reached an agreement, the Commission was also content to ignore the overwhelming weight of the evidence and adopt recommendations which were not based upon competent and substantial evidence.

As noted by the Missouri Court of Appeals, Commissioner Slavin's concurring opinion explained the decision on the ground that "the stipulated rates can go into effect almost immediately, whereas if the Commission goes to full hearing to determine the merits of the case on full evidence, a decision which would take effect in this heating season is almost impossible." (Petitioner's Brief for Certiorari, Appendix D at A-18) Such considerations do not justify departure from the regulatory framework established by the legislature. 645 S.W.2d at 43.

The concurring opinion of Commissioner Slavin recognized that the stipulation was contrary to recent Commission decisions and the evidence in the record:

> Although the stipulation goes counter to some of the decisions reached in the area of rate design by the Commission in other gas rate design cases, it does offer some immediate relief to the space heating customers of Laclede Gas. Although the stipulation does consolidate schedules and divisions, it imposes an increase on general service customers which cannot be supported other than through this compromise. It leaves in place a declining block structure although modified, which is designed to protect the largest residential users of gas when more appropriate measures to protect these users might have been considered. These features represent the compromise of

the parties involved. (Petitioner's Brief for Certiorari, Appendix D at A-18.)

The Commission's failure to make findings of fact or read the transcripts is an additional indication of the extent to which it discarded its responsibility to determine rates on the basis of the evidence.

Aside from ignoring these legal considerations, Petitioner's contention regarding the potential effect of the Missouri Court of Appeals' decision is based on the erroneous premise that the decision will eliminate the use of non-unanimous stipulations and agreements in Commission proceedings. However, since the Missouri Court of Appeals' decision was issued on November 9, 1982, there have been cases before the Commission in which a non-unanimous stipulation agreement was entered into and submitted to the Commission in the context of a full hearing.[5] Substantial confusion has not been created by the Missouri Court of Appeals' decision. Instead the decision has significantly clarified the procedures to be used whenever all parties do not join in a stipulation and agreement.

[5]In both *In Re Saline Sewer Company*, Case No. SR-82-262 (Mo. P.S.C. December 22, 1983) and *In Re Martigney Creek Sewer Company*, Case No. SR-83-166, (Mo. P.S.C. March 4, 1983) the utility and Staff of the Missouri Public Service Commission entered into a non-unanimous stipulation and agreement. Although Public Counsel opposed the terms of the stipulation and agreement in both instances and only one hearing was held to determine the merits of the case, the utility and Staff did not hesitate to enter into the non-unanimous agreements.

CONCLUSION

For each of the foregoing reasons, the Office of the Public Counsel of the State of Missouri respectfully requests that the Court deny the Petitioner's request for a writ of certiorari to review the judgment and opinion of the lower court in this matter.

Respectfully submitted,

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Supreme Court of the United States

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Petitioner,

v.

OFFICE OF THE PUBLIC COUNSEL OF THE STATE OF MISSOURI,

Respondent.

RESPONSE OF RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI SUPPORTING PETITION OF LACLEDE GAS COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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Respondent Public Service Commission of the State of Missouri (Missouri Commission) received the Petition for Writ of Certiorari of Petitioner Laclede Gas Company (Laclede) on May 25, 1983. Pursuant to U.S. Supreme Court Rule 19.6 the Missouri Commission hereby responds in support of Petitioner.

The Missouri Commission supports Laclede's Petition for Writ of Certiorari in all respects.

The question presented is an issue of great importance and interest to all citizens of the State of Missouri. The Missouri Commission regulates the business of all public utilities and rail and motor common carriers in the State,

often in regulatory proceedings involving multiple parties. To do so effectively and efficiently the Missouri Commission must have the authority to structure its proceedings in a manner most conducive to the efficient, reasonable and lawful disposition of non-unanimous settlement agreements.

The decision below erroneously interprets the Fourteenth Amendment to deprive the Missouri Commission of a procedural tool which does no more than allow for efficient and expeditious resolution of certain cases before it in a manner which promotes the public interest, and does no less than allow all parties a meaningful opportunity to be heard with all Fourteenth Amendment rights to due process preserved.

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